

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 BANK OF AMERICA, N.A.,

4 Plaintiff

5 v.

6 SFR INVESTMENTS POOL 1, LLC, et al.,

7 Defendants

Case No.: 2:15-cv-01771-APG-NJK

**Order (1) Granting in Part SFR's Motion  
for Summary Judgment and (2) Granting  
Bank of America's Motion for Summary  
Judgment**

[ECF Nos. 70, 71]

8 Plaintiff Bank of America, N.A. sues to determine whether its deed of trust encumbering  
9 property located at 10828 Mystic Shore Avenue in Las Vegas, Nevada was extinguished by a  
10 nonjudicial foreclosure sale conducted by a homeowners association (HOA). Defendant SFR  
11 Investments Pool 1, LLC (SFR) purchased the property at the foreclosure sale. Bank of America  
12 seeks a declaration that its deed of trust still encumbers the property. SFR counterclaims for  
13 declaratory relief that it purchased the property free and clear of the deed of trust.<sup>1</sup> SFR also  
14 filed a declaratory relief cross-claim against the former homeowner, Ryan Torrisi.

15 Bank of America and SFR move for summary judgment on a variety of grounds. The  
16 parties are familiar with the facts so I do not repeat them here except where necessary. I grant  
17 Bank of America's motion and deny SFR's motion as to Bank of America because no genuine  
18 dispute remains that Bank of America tendered the superpriority amount, thereby extinguishing  
19 the superpriority lien and rendering the sale void as to the deed of trust. I grant SFR's motion as  
20 to its cross-claim against Torrisi because the HOA foreclosure sale extinguished Torrisi's interest  
21 in the property.

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23  
<sup>1</sup> SFR also asserted a claim for slander of title, but it abandoned that claim. ECF No. 71 at 3 n.1.

1 **I. ANALYSIS**

2 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to  
3 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
4 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”  
5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence  
6 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

7 The party seeking summary judgment bears the initial burden of informing the court of  
8 the basis for its motion and identifying those portions of the record that demonstrate the absence  
9 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
10 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
11 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
12 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
13 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
14 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
15 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
16 F.3d 915, 920 (9th Cir. 2008).

17 **A. Torrisi**

18 SFR moved for judgment as to Bank of America and Torrisi. ECF No. 71 at 1. Torrisi  
19 previously defaulted in this case. ECF No. 47. He did not respond to SFR’s motion. He  
20 therefore has not pointed to evidence that would (1) counter SFR’s evidence and the presumption  
21 that the HOA sale was properly conducted, (2) overcome the presumption in favor of SFR as  
22 titleholder of record, or (3) otherwise support setting aside the sale as to him. *See Nationstar*  
23

1 *Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 646 (Nev. 2017).

2 Consequently, I grant SFR's motion as to Torrisi.

3 **B. Bank of America**

4 Under Nevada law, a "first deed of trust holder's unconditional tender of the superpriority  
5 amount due results in the buyer at foreclosure taking the property subject to the deed of trust."

6 *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev. 2018) (en banc). To  
7 be valid, tender must be for "payment in full" and must either be "unconditional, or with  
8 conditions on which the tendering party has a right to insist." *Id.* at 118.

9 Bank of America has met its burden of establishing that it tendered the superpriority  
10 amount in full. The monthly HOA assessment was \$50 per month. ECF Nos. 70-22; 70-23.

11 Prior to the HOA foreclosure sale, Bank of America tendered \$450 to the HOA's foreclosure  
12 agent, Nevada Association Services, Inc. (NAS), to cover the superpriority amount of nine  
13 months of assessments. ECF No. 70-7 at 15-17. NAS refused to accept the check, consistent  
14 with NAS's policy at the time to not accept tenders of nine months of assessments. *Id.* at 19;  
15 ECF No. 70-24 at 5-6. SFR has presented no contrary evidence in response. Consequently, no  
16 genuine dispute remains that the superpriority lien was extinguished and the property remains  
17 subject to the deed of trust. *Bank of Am., N.A.*, 427 P.3d at 121.

18 SFR raises several arguments as to why tender did not extinguish the superpriority lien.  
19 None raises a genuine dispute precluding summary judgment.

20 *1. Evidentiary Challenges*

21 SFR objects to a ledger with the Bates stamp BANA000047, which is the ledger for  
22 another property located in the same HOA that Bank of America used to calculate its tender for  
23 this property. SFR contends this ledger has not been authenticated. Next, SFR contends Bank of

1 America cannot show tender was delivered to NAS because it cannot rely on the affidavit of  
2 Adam Kendis, a paralegal with the law firm Miles Bauer Bergstrom & Winters, LLP (Miles  
3 Bauer). SFR argues that Kendis lacks knowledge to authenticate the runner's slip attached to his  
4 affidavit and there is inadmissible hearsay within that document. It also argues that Bank of  
5 America cannot rely on a screenshot from Miles Bauer's computer database because it contains  
6 hearsay. SFR also contends that NAS's Rule 30(b)(6) witness testified that NAS did not receive  
7 the tender letter for this property. SFR thus argues Bank of America has not shown that it  
8 tendered the proper superpriority amount.

9 Bank of America responds that SFR objects only to the ledger from a different property,  
10 but it provided NAS's ledger for this property, to which SFR did not object, and that the ledger  
11 establishes the monthly assessment and does not show any charges for maintenance or nuisance  
12 abatement. Bank of America argues Kendis can authenticate the documents attached to his  
13 exhibit, including the runner's slip, because they are part of Miles Bauer's records and qualify as  
14 nonhearsay under the business records exception.

15 Bank of America has presented sufficient proof from which a reasonable jury could find  
16 the ledger from NAS "is what its proponent claims." Fed. R. Evid. 901(a). Kendis states he has  
17 personal knowledge of Miles Bauer's procedures for creating and maintaining its business  
18 records and he sets forth the prerequisites for the business records exception to hearsay. ECF No.  
19 101-6 at 2; Fed. R. Evid. 803(b). The business records exception does not require that the  
20 custodian of records for the business that created the document be the one to authenticate it. *See*  
21 *MRT Const. Inc. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998). Rather, someone from  
22 another business (like Miles Bauer) who relied upon the accuracy of the business record may  
23 properly authenticate it. *Id.* Miles Bauer's records show it requested the superpriority amount

1 from NAS, and NAS did not respond, so Miles Bauer used a ledger from the same HOA for  
2 another property to calculate the superpriority amount. ECF No. 70-7. Miles Bauer then  
3 tendered \$450 to NAS, which NAS refused to accept pursuant to its policy. *Id.*; ECF No. 70-24.  
4 Contrary to SFR's description of the testimony of NAS's Rule 30(b)(6) witness, he did not state  
5 that NAS never received the tender for this property. Rather, he stated that NAS would have no  
6 record of this tender attempt due to NAS's policy of rejecting such tenders at the reception desk.  
7 ECF No. 70-24.

8         Although SFR objects to the ledger from a different property, it did not object to the  
9 ledger from NAS related to this property or to the HOA's financial transactions related to this  
10 property, both of which reflect a \$50 monthly assessment and no maintenance or nuisance  
11 abatement charges. ECF Nos. 70-22; 70-23. Even if this evidence is not currently in admissible  
12 form, Bank of America need not present the evidence in admissible form at summary judgment.  
13 *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) ("At the summary judgment stage, we  
14 do not focus on the admissibility of the evidence's form. We instead focus on the admissibility  
15 of its contents."). Bank of America could call witnesses from the HOA to identify the monthly  
16 assessment amount and from Miles Bauer, NAS, and if needed, the runner's company, to testify  
17 about the tender attempt. Because the evidence could be presented in admissible form at trial, I  
18 may consider it at summary judgment. *Id.*

19         SFR has presented no evidence to suggest the monthly assessment amount is anything  
20 other than what is reflected in the HOA's financial transactions and NAS's ledger, and it has  
21 presented no other evidence of maintenance or nuisance abatement charges. SFR therefore has  
22 failed to raise a genuine dispute about the superpriority amount. *See Bank of Am., N.A. v.*  
23 *Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 623 (9th Cir. 2019) (holding tender of

1 nine months of assessments was sufficient where the HOA's "ledger did not indicate that the  
2 property had incurred any charges for maintenance or nuisance abatement").

3 In sum, SFR does not present any evidence to dispute the superpriority amount, the  
4 existence or nonexistence of maintenance or nuisance abatement charges, tender, delivery, or  
5 rejection. Consequently, no genuine dispute remains that Bank of America tendered the  
6 superpriority amount, thereby extinguishing the superpriority portion of the lien and rendering  
7 the HOA sale void as to the deed of trust.

## 8 2. *Standing*

9 SFR contends that Bank of America lacks standing to enforce the note and deed of trust  
10 because it has not produced the original note, deed of trust, or assignment to Bank of America. It  
11 also argues Bank of America must establish that the note and deed of trust have been reunified  
12 through valid transfers to Bank of America. Finally, SFR contends Bank of America cannot rely  
13 on the recorded documents or copies of those documents because in other cases it has been  
14 shown that recorded documents were inaccurate or inauthentic.

15 Bank of America responds that it does not seek to enforce the note in this action so  
16 arguments about the note are irrelevant. Bank of America contends it is undisputed that it is the  
17 beneficiary of record for the deed of trust and SFR has presented no evidence to the contrary.

18 The question in this case is not whether Bank of America could presently foreclose. The  
19 question is whether Bank of America has a sufficient interest in the deed of trust that it has  
20 standing to seek declaratory relief as to the deed of trust's continuing validity. Bank of America  
21 is the beneficiary of record. ECF No. 70-3. SFR has presented no contrary evidence. Bank of  
22 America therefore has standing to seek a declaration that the deed of trust remains an  
23 encumbrance on the property. SFR's contention that some documents in other cases have been

1 shown to be incorrect or inauthentic does not raise an issue of fact in this case. SFR must show  
2 “more than metaphysical doubt as to the material facts,” and it “has not done so here.”  
3 *Berezovsky v. Moniz*, 869 F.3d 923, 933 (9th Cir. 2017) (quotation omitted). Speculation that  
4 there might be errors is insufficient to preclude summary judgment. *Emeldi v. Univ. of Oregon*,  
5 698 F.3d 715, 728 (9th Cir. 2012).

### 6 3. Impermissible Conditions

7 SFR contends Chapter 116 precluded the HOA from entering into a contract with Bank of  
8 America through acceptance of the Miles Bauer tender that would waive the HOA’s rights to a  
9 superpriority lien. Specifically, SFR argues that the Miles Bauer tender letter contained an  
10 impermissible condition that the HOA waive or subordinate its right to the portion of the  
11 superpriority lien consisting of maintenance and nuisance abatement charges. Bank of America  
12 responds that the Supreme Court of Nevada has already found an identical Miles Bauer letter to  
13 be a valid tender. Additionally, Bank of America notes that arguments about maintenance or  
14 nuisance abatement charges are irrelevant because there is no evidence of these types of charges  
15 related to this property and any such charges arising later would not be part of the superpriority  
16 lien unless the HOA filed a new notice of delinquent assessment lien.

17 The Supreme Court of Nevada has already held that where, as here, there is no evidence  
18 of maintenance or nuisance abatement charges, identical Miles Bauer letters did not impose  
19 impermissible conditions on tender. *See Bank of Am., N.A.*, 427 P.3d at 117-18; *BDJ Invs., LLC*  
20 *v. Bank of Am., N.A.*, No. 76481, 448 P.3d 573, 2019 WL 4392466, at \*1 (Nev. 2019) (“Because  
21 nothing in the record indicates that the HOA had incurred any maintenance or nuisance  
22 abatement charges at the time the tender was made, the letter cannot reasonably be construed as  
23 forcing the HOA to waive its right to afford superpriority status to any such charges that might

1 be assessed in the future.”); *Alliant Commercial, LLC v. Bank of New York Mellon*, No. 76565,  
2 443 P.3d 544, 2019 WL 2725620, at \*1 (Nev. 2019) (“Assuming without deciding that the tender  
3 contained a misstatement of law, such a misstatement is not an impermissible condition as it does  
4 not require anything of the HOA for the HOA to be able to accept the tender. Furthermore, no  
5 such [maintenance and nuisance abatement] charges are at issue in this case. Thus, the purported  
6 misstatement does not alter the tender’s legal effect.”). Because there is no evidence of  
7 maintenance or nuisance abatement charges, the tender letter did not contain impermissible  
8 conditions. Additionally, if such charges arose later, the HOA “would have been required to  
9 issue new foreclosure notices if it sought to afford those costs superpriority status.” *Doreen*  
10 *Properties, LLC v. U.S. Bank Nat’l Ass’n as Tr. for Holders of Bear Sterns Alt-A Tr. 2006-3*, No.  
11 75885-COA, 2019 WL 2474893, at \*1 (Nev. App. June 12, 2019) (citing *Property Plus Invs.,*  
12 *LLC v. Mortgage Elec. Registration Sys.*, 401 P.3d 728, 731-32 (Nev. 2017) (en banc) (stating  
13 that the HOA is not limited to one superpriority lien but it must initiate a new foreclosure process  
14 to enforce a second superpriority default).

#### 15 4. *Equities and Bona Fide Purchaser*

16 SFR argues that even if Bank of America tendered the superpriority amount, I still must  
17 balance the equities before setting aside the sale, which would include an evaluation of SFR’s  
18 bona fide purchaser status. SFR also argues Bank of America waived the right to assert tender,  
19 should be equitably estopped from doing so, and has unclean hands. Bank of America responds  
20 that because the tender extinguished the superpriority lien as a matter of law, I should not  
21 balance the equities or consider SFR’s status as a bona fide purchaser. Alternatively, Bank of  
22 America argues that if I do, I should rule in its favor because it tendered, NAS wrongfully  
23 rejected tender, and the sale price was grossly inadequate. Finally, Bank of America argues



1 waiver, estoppel, and unclean hands do not apply because it did what it was supposed to do to  
2 preserve the deed of trust by making a valid tender.

3 “[T]ender of the superpriority portion of an HOA lien satisfies that portion of the lien by  
4 operation of law.” *Bank of Am., N.A.*, 427 P.3d at 120. Because “valid tender cured the default  
5 as to the superpriority portion of the HOA’s lien, the HOA’s foreclosure on the entire lien  
6 resulted in a void sale as to the superpriority portion.” *Id.* at 121. A “party’s status as a [bona  
7 fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void.”  
8 *Id.* For these same reasons, I do not weigh the equities if tender was valid because “the voiding  
9 of the foreclosure sale as to the superpriority portion of the lien is ultimately the result of the  
10 operation of law and not equitable relief.” *Salomon v. Bank of Am., N.A.*, No. 75200-COA, 2019  
11 WL 3231009, at \*2 n.3 (Nev. App. July 17, 2019). SFR has not pointed to a single case where,  
12 after finding valid tender, the Supreme Court of Nevada then engaged in a balancing of the  
13 equities. Instead, that court has consistently held that tender voids the sale as to the deed of trust  
14 by operation of law and as a result bona fide purchaser status is irrelevant, and it has engaged in  
15 no further inquiry or balancing.

16 Finally, Bank of America “has not waived its right to protect its deed of trust, is not  
17 estopped from asserting that right, nor does it have unclean hands because it allowed [the  
18 HOA’s] foreclosure to proceed without interceding to halt the foreclosure” because Bank of  
19 America satisfied the superpriority portion of the lien before the foreclosure, so it “was under no  
20 obligation to intercede or halt the foreclosure once it protected its own interest.” *Bank of New  
21 York Mellon v. Green Valley S. Owners Ass’n*, No. 1, No. 2:17-CV-2024-KJD-EJY, 2019 WL  
22 4393356, at \*6 (D. Nev. Sept. 13, 2019); *see also Bank of America, N.A.*, 427 P.3d at 119-21  
23 (tender need not be recorded or deposited into court).

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